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8 *Attorneys for Plaintiff*

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

10/27/2023
Clerk of the Court
BY: WILLIAM TRUPEK
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 PRECILA BALABBO,

12 Plaintiff,

13 vs.

14 FRUIT OF THE EARTH, INC., FIVE
BELOW, INC.,

Defendants.

Case No.: CGC-22-602637

**FIRST AMENDED COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE RELIEF**

**(Violation of Health & Safety Code § 25249.5 et
seq.)**

15 Plaintiff Precila Balabbo (“Plaintiff”), by and through her attorneys, alleges the following
16 cause of action in the public interest of the citizens of the State of California.

17 **BACKGROUND OF THE CASE**

18 1. Plaintiff brings this representative action on behalf of all California citizens to
19 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
20 the Health and Safety Code § 25249.5 et seq (“Proposition 65”), which reads, in relevant part,
21 “[n]o person in the course of doing business shall knowingly and intentionally expose any
22 individual to a chemical known to the state to cause cancer without first giving clear and reasonable
23 warning to such individual ...”. Health & Safety Code § 25249.6.

24 2. This first amended complaint is a representative action brought by Plaintiff in the
25 public interest of the citizens of the State of California to enforce the People’s right to be informed
26 of the health hazards caused by exposure to diethanolamine (DEA) and benzene, toxic chemicals
27 found in (a) *Fruit of The Earth*® aloe vera after sun lotions, UPC # 071661612208, (b) *Up + Up*®
28 *aloe vera gels*, UPC # 071661826131, and/or (c) *Walgreens*® after sun gels, UPC #

1 049022507326, sold and/or distributed by defendants Fruit Of The Earth, Inc. (“FOTE”) and/or
2 Five Below, Inc. (“Five Below”) (collectively, “Defendants”) in California.

3 3. DEA is a harmful chemical known to the State of California to cause cancer.¹
4 Benzene is a harmful chemical known to the State of California to cause cancer and birth defects
5 or other reproductive harm.²

6 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
7 within California or sell products therein to comply with Proposition 65 regulations. Included in
8 such regulations is the requirement that businesses must label any product containing a Proposition
9 65-listed chemical that will create an exposure above safe harbor levels with a “clear and
10 reasonable” warning before “knowingly and intentionally” exposing any person to any such listed
11 chemical.

12 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
13 for up to 365 days to be imposed upon defendants in a civil action for violations of Proposition 65.
14 Health & Safety Code § 25249.7(b). Proposition 65 also allows for any court of competent
15 jurisdiction to enjoin the actions of a defendant which “violate or threaten to violate” the statute.
16 Health & Safety Code § 25249.7.

17 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
18 without a requisite exposure warning, (a) *Fruit of The Earth*® aloe vera after sun lotions, UPC #
19 071661612208, (DEA and benzene), (b) *Up + Up*® aloe vera gels, UPC # 071661826131, (DEA),
20 and (c) *Walgreens*® after sun gels, UPC # 049022507326, (DEA) (each a “Product” and
21
22

23
24 ¹ On June 22, 2012, the State of California listed DEA as a chemical known to the State to cause
25 cancer and it has come under the purview of Proposition 65 regulations since that time. Cal. Code
26 Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

27 ² On February 27, 1987, the State of California listed benzene as a chemical known to the State to
28 cause cancer and it has come under the purview of Proposition 65 regulations since that time. Cal.
Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On December
26, 1997, the State of California listed benzene as a chemical known to cause birth defects or other
reproductive harm.

1 collectively, the “Products”) that expose persons to DEA and/or benzene when used for their
2 intended purpose.

3 7. Defendants’ failure to warn consumers and other individuals in California of the
4 health hazards associated with exposure to DEA and/or benzene in conjunction with the sale and/or
5 distribution of the Products is a violation of Proposition 65 and subjects Defendants to the
6 enjoinder and civil penalties described herein.

7 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
8 65 in accordance with Health and Safety Code § 25249.7(b).

9 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
10 Defendants to provide purchasers or users of the Products with required warnings related to the
11 dangers and health hazards associated with exposure to DEA pursuant to Health and Safety Code
12 § 25249.7(a).

13 10. Plaintiff further seeks a reasonable award of attorney’s fees and costs.

14 **PARTIES**

15 11. Plaintiff is a citizen of the State of California acting in the interest of the general
16 public to promote awareness of exposures to toxic chemicals in products sold in California and to
17 improve human health by reducing hazardous substances contained in such items. She brings this
18 action in the public interest pursuant to Health and Safety Code § 25249.7(d).

19 12. Defendant FOTE, through its business, effectively imports, distributes, sells, and/or
20 offers the Products for sale or use in the State of California, or it implies by its conduct that it
21 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
22 Plaintiff alleges that defendant FOTE is a “person” in the course of doing business within the
23 meaning of Health & Safety Code sections 25249.6 and 25249.11.

24 13. Defendant Five Below, through its business, effectively imports, distributes, sells,
25 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
26 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
27 Plaintiff alleges that defendant Five Below is a “person” in the course of doing business within the
28 meaning of Health & Safety Code sections 25249.6 and 25249.11.

1 **VENUE AND JURISDICTION**

2 14. Venue is proper in the County of San Francisco because one or more of the
3 instances of wrongful conduct occurred, and continue to occur in this county and/or because
4 Defendants conducted, and continue to conduct, business in the County of San Francisco with
5 respect to the Products.

6 15. This Court has jurisdiction over this action pursuant to California Constitution
7 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
8 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement
9 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has
10 jurisdiction over this lawsuit.

11 16. This Court has jurisdiction over Defendants because each defendant is either a
12 citizen of the State of California, has sufficient minimum contacts with the State of California, is
13 registered with the California Secretary of State as foreign corporations authorized to do business
14 in the State of California, and/or has otherwise purposefully availed itself of the California market.
15 Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent
16 and permissible with traditional notions of fair play and substantial justice.

17 **STATUTORY BACKGROUND**

18 17. The people of the State of California declared in Proposition 65 their right “[t]o be
19 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
20 harm.” (Section 1(b) of Initiative Measure, Proposition 65.)

21 18. To effect this goal, Proposition 65 requires that individuals be provided with a
22 “clear and reasonable warning” before being exposed to substances listed by the State of California
23 as causing cancer and birth defects or other reproductive harm. H&S Code § 25249.6 states, in
24 pertinent part:

25 No person in the course of doing business shall knowingly and intentionally expose any
26 individual to a chemical known to the state to cause cancer or reproductive toxicity without
27 first giving clear and reasonable warning to such individual...

1 19. An exposure to a chemical in a consumer product is one “which results from a
2 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
3 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
4 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
5 shall provide a warning to any person to whom the product is sold or transferred unless the product
6 is packaged or labeled with a clear and reasonable warning.”

7 20. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or
8 more of the following methods individually or in combination:³

9 a. A warning that appears on a product’s label or other labeling.

10 b. Identification of the product at the retail outlet in a manner which provides
11 a warning. Identification may be through shelf labeling, signs, menus, or a combination
12 thereof.

13 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be
14 prominently placed upon a product’s labels or other labeling or displayed at the retail outlet
15 with such conspicuousness, as compared with other words, statements, designs, or devices
16 in the label, labeling or display as to render it likely to be read and understood by an
17 ordinary individual under customary conditions of purchase or use.

18 d. A system of signs, public advertising identifying the system and toll-free
19 information services, or any other system that provides clear and reasonable warnings.

20 21. Proposition 65 provides that any “person who violates or threatens to violate” the
21 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
22 “threaten to violate” is defined to mean creating “a condition in which there is a substantial
23 probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil
24

25
26
27 ³ Alternatively, a person in the course of doing business may elect to comply with the warning
28 requirements set out in the amended version of 27 CCR 25601, *et.seq.* as amended on August 30,
2016, and operative on August 30, 2018.

1 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
2 365 days.

3 **FACTUAL BACKGROUND**

4 22. On June 22, 2012, the State of California listed DEA as a chemical known to the
5 State to cause cancer and it has come under the purview of Proposition 65 regulations since that
6 time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

7 23. On February 27, 1987, the State of California listed benzene as a chemical known
8 to the State to cause cancer and it has come under the purview of Proposition 65 regulations since
9 that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
10 On December 26, 1997, the State of California listed benzene as a chemical known to cause birth
11 defects or other reproductive harm.

12 24. The exposures that are the subject of the Notices result from the purchase,
13 acquisition, handling and recommended use of the Products. The primary route of exposure to
14 DEA and/or benzene is through dermal exposure. Some amount of exposure through ingestion can
15 occur by touching the Product with subsequent touching of the user's hand to mouth. No clear and
16 reasonable warning is provided with the Products regarding the health hazards of exposure to DEA
17 and/or benzene.
18

19 25. Defendants have manufactured, processed, marketed, distributed, offered to sell
20 and/or sold the Products in California since at least May 17, 2023 with respect to the *Up + Up*®
21 Product and the *Walgreens*® Product; and since at least July 7, 2023 with respect to the *Fruit Of*
22 *The Earth*® Product. The Products continue to be distributed and sold in California without the
23 requisite warning information.

24 26. At all times relevant to this action, Defendants have knowingly and intentionally
25 exposed users of the Products to DEA and/or benzene without first giving a clear and reasonable
26 exposure warning to such individuals.

27 27. As a proximate result of acts by each defendant, as a person in the course of doing
28 business within the meaning of H&S Code § 25249.11, individuals throughout the State of

1 California, including in San Francisco County, have been exposed to DEA and/or benzene without
2 a clear and reasonable warning on the Products. The individuals subject to the violative exposures
3 include normal and foreseeable users and consumers that use the Products, as well as all others
4 exposed to the Products.

5 **SATISFACTION OF NOTICE REQUIREMENTS**

6 28. Plaintiff purchased the Products from Five Below and/or Walgreens. At the time of
7 purchase, Defendants did not provide a Proposition 65 exposure warning for DEA, benzene, or
8 any other Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as
9 described *supra*.

10 29. The *Up + Up*® Product, the *Walgreens*® Product, and the *Fruit Of The Earth*®
11 Product were sent to a testing laboratory for diethanolamine testing to determine the
12 diethanolamine content of the Products. The *Fruit Of The Earth*® Product was also sent to a
13 testing laboratory for benzene testing to determine the benzene content of the Product.

14 30. For each Product that was sent to the laboratory, Plaintiff received a chemical test
15 report (each a “Chemical Test Report” and collectively, the “Chemical Test Reports”). The
16 Chemical Test Reports findings determined the *Up + Up*® Product, the *Walgreens*® Product, and
17 the *Fruit Of The Earth*® Product exposes users to DEA; and the *Fruit Of The Earth*® Product
18 exposes users to benzene.

19 31. Plaintiff provided each Chemical Test Report and each Product to an analytical
20 chemist to determine if, based on the findings of the Chemical Test Reports and the reasonable
21 and foreseeable use of the Products, exposure to DEA and/or benzene will occur at levels that
22 require Proposition 65 warnings under the Clear and Reasonable Warnings section 25601 of Title
23 27 of the California Code of Regulations.

24 32. On May 17, 2023, Plaintiff received from the analytical chemist an exposure
25 assessment report which concluded that persons in California who use the *Up + Up*® Product and
26 the *Walgreens*® Product will be exposed to levels of DEA that require a Proposition 65 exposure
27 warning. On July 7, 2023, Plaintiff received from the analytical chemist an exposure assessment
28

1 report which concluded that persons in California who use the *Fruit Of The Earth*® Product will
2 be exposed to levels of DEA and benzene that require a Proposition 65 exposure warning.

3 33. On May 17, 2023 (*Up + Up*® *aloe vera gels*, UPC # 071661826131, and
4 *Walgreens*® after sun gels, UPC # 049022507326) and July 7, 2023 (*Fruit of The Earth*® *aloe*
5 *vera* after sun lotions, UPC # 071661612208), Plaintiff gave notice of alleged violations of Health
6 and Safety Code § 25249.6 (collectively, the “Notices”) to Defendants concerning the exposure of
7 California citizens to DEA and/or benzene from use of the Products without proper warning,
8 subject to a private action to Defendants and to the California Attorney General’s office and the
9 offices of the County District attorneys and City Attorneys for each city with a population greater
10 than 750,000 persons wherein the herein violations allegedly occurred. See attached at Exhibits
11 “A – C” a true and correct copy of the Notices.

12 34. The Notices complied with all procedural requirements of Proposition 65 including
13 the attachment of a Certificate of Merit affirming that Plaintiff’s counsel had consulted with at
14 least one person with relevant and appropriate expertise who reviewed relevant data regarding
15 DEA and/or benzene exposure, and that counsel believed there was meritorious and reasonable
16 cause for a private action.

17 35. After receiving the Notices, and to Plaintiff’s best information and belief, none of
18 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
19 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
20 are the subject of the Notices.

21 36. Plaintiff is commencing this action more than sixty (60) days from the date of the
22 Notices to Defendants, as required by law.

23 **FIRST CAUSE OF ACTION**

24 **(By Plaintiff against Defendants for the Violation of Proposition 65)**

25 37. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 36 of
26 this First Amended Complaint as though fully set forth herein.

27 38. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
28 of the Products.

1 39. Use of the Products will expose users and consumers thereof to DEA and/or
2 benzene, hazardous chemicals found on the Proposition 65 list of chemicals known to be hazardous
3 to human health.

4 40. The Products do not comply with the Proposition 65 warning requirements.

5 41. Plaintiff, based on her best information and belief, avers that at all relevant times
6 herein, and since at least May 17, 2023 with respect to the *Up + Up*® Product and the *Walgreens*®
7 Product; and since at least July 7, 2023 with respect to the *Fruit Of The Earth*® Product, continuing
8 until the present, that Defendants have continued to knowingly and intentionally expose California
9 users and consumers of the Products to DEA and/or benzene without providing required warnings
10 under Proposition 65.

11 42. The exposures that are the subject of the Notices result from the purchase,
12 acquisition, handling and recommended use of the Products. The primary route of exposure to
13 DEA and/or benzene is through dermal exposure. Some amount of exposure through ingestion can
14 occur by touching the Product with subsequent touching of the user's hand to mouth. No clear and
15 reasonable warning is provided with the Products regarding the health hazards of exposure to DEA
16 and/or benzene.

17 43. Plaintiff, based on her best information and belief, avers that such exposures will
18 continue every day until clear and reasonable warnings are provided to purchasers and users or
19 until these known toxic chemicals are removed from the Products.

20 44. Defendants have knowledge that the normal and reasonably foreseeable use of the
21 Products exposes individuals to DEA and/or benzene, and Defendants intend that exposures to
22 DEA and/or benzene will occur by its deliberate, non-accidental participation in the importation,
23 distribution, sale and offering of the Products to consumers in California.

24 45. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
25 First Amended Complaint.

26 46. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
27 described acts, Defendants are liable for a maximum civil penalty of \$2,500 per day per violation.
28

1 47. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
2 authorized to grant injunctive relief in favor of Plaintiff and against Defendants.


3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following
5 relief:

- 6 A. That the court assess civil penalties against each defendant in the amount of \$2,500
7 per day for each violation for up to 365 days in accordance with Health and Safety Code §
8 25249.7(b);
- 9 B. That the court preliminarily and permanently enjoin Defendants mandating
10 Proposition 65 compliant warnings on the Products;
- 11 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the
12 amount of \$50,000.00.
- 13 D. That the court grant any further relief as may be just and proper.

14 Dated: October 27, 2023

BRODSKY SMITH

15 By: 
16 Evan J. Smith (SBN242352)
17 Ryan P. Cardona (SBN302113)
18 9595 Wilshire Boulevard, Suite 900
19 Beverly Hills, CA 90212
20 Telephone: (877) 534-2590
21 Facsimile: (310) 247-0160

Attorneys for Plaintiff

EXHIBIT “A”

LAW OFFICES
BRODSKY & SMITH

9595 WILSHIRE BLVD., STE. 900
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MINEOLA, NY 11501
516.741.4977

PENNSYLVANIA OFFICE
TWO BALA PLAZA, STE. 805
BALA CYNWYD, PA 19004
610.667.6200

May 17, 2023

President/CEO Fruit of The Earth, Inc. c/o The Corporation Trust Company Corporation Trust Center 1209 Orange Street Wilmington, DE 19801	President/CEO Fruit of The Earth, Inc. c/o Thomas E. McCurry Sr. 3325 W. Trinity Blvd. Grand Prairie, TX 75050
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60-Day Notice of Violation of California Safe Drinking Water and Toxic Enforcement Act¹

To Whom It May Concern:

This Notice of Violation (the "Notice") is provided to you pursuant to and in compliance with California Health & Safety Code § 25249.7(d).

Brodsky & Smith ("Brodsky Smith") represents Precila Balabbo ("Balabbo"), a citizen of the State of California acting in the interest of the general public to promote awareness of exposures to toxic chemicals from use of consumer products sold in California and to improve human health and the environment by reducing hazardous substances.

With respect to the Product herein, Balabbo has identified a violation of California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65") codified at Cal. Health & Safety Code § 25249.5, et seq. This violation has occurred and continues to occur because the alleged Violator(s) failed to provide a clear and reasonable health hazard warning in connection with the sale or use of the Product in California. Health & Safety Code § 25249.6 provides that "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the State to cause cancer or reproductive toxicity without first providing a clear and reasonable warning to such individual ..." Without proper warnings regarding the toxic effects of exposures to the Listed Chemical resulting from use of the Product, California citizens lack the information necessary to make informed decisions on whether and/or how to eliminate (or reduce) the risk of exposure to the Listed Chemical from the reasonably foreseeable use of the Product.

I. DESCRIPTION OF THE VIOLATION

- 1. Enforcer:** Precila Balabbo, 285 W. 6th Street, Unit 209, San Pedro, CA 90731; (Ph) 818-434-4023.
- 2. Alleged Violator(s):** Fruit of The Earth, Inc.

¹ The public enforcement agencies that have been served with copies of this Notice are identified in the attached distribution list accompanying the Certificate of Service.

3. **Time Period of Exposure:** Violations have been occurring since at least May 17, 2023 and are continuing to this day.
4. **Listed Chemical:** Diethanolamine (DEA) is listed under Proposition 65 as a chemical known to the State to cause reproductive toxicity.
5. **Product:**

Product ²	Non- Exclusive Examples of the Product
After Sun Gel	Walgreens After Sun Gel UPC# 049022507326

6. **Description of Exposure:** The exposures that are the subject of this Notice result from the purchase, acquisition, handling and recommended use of the Product. The primary route of exposure to the Listed Chemical is through dermal exposure. Some amount of exposure through ingestion can occur by touching the Product with subsequent touching of the user's hand to mouth. No clear and reasonable warning is provided with the Products regarding the health hazards of exposure to the Listed Chemical.

II. PROPOSITION 65 INFORMATION

For the Violators' reference, enclosed is a copy of "Proposition 65: A Summary" that has been prepared by the Office of Environmental Health Hazard Assessment ("OEHHA"). For more information concerning the provisions of Proposition 65, contact OEHHA at 916.445.6900.

III. RESOLUTION OF THE CLAIMS

Based on the allegations set forth in this Notice, Brodsky Smith intends to file a citizen enforcement lawsuit on behalf of Balabbo against the alleged Violator(s) unless such Violator(s) agree in a binding written agreement to: (1) recall Products already sold; (2) provide Proposition 65 compliant exposure warnings for Products sold in the future or reformulate the Products to eliminate exposures to the Listed Chemical; and (3) pay an appropriate civil penalty based on the factors enumerated in Health & Safety Code § 25249.7(b). Consistent with the public interest goals of Proposition 65 and the desire to have these violations of California law quickly rectified, Balabbo is interested in seeking a constructive resolution of the claims in this Notice without engaging in costly and protracted litigation.

² The specifically identified example of the Product in this Notice is to assist the recipients' investigation of, among other things, the magnitude of potential exposures to the Listed Chemical from other items within the definition of Products. This example is not intended to be an exhaustive or comprehensive identification of each specific offending Product. It is Balabbo's position that the alleged Violators are obligated to conduct a good faith investigation into other Products that may have been manufactured, distributed, sold, shipped, stored (or otherwise within the alleged Violators' custody or control) during the relevant period to ensure that requisite health hazard warnings were and are provided to California citizens prior to purchase and use.

Balabbo has retained me as legal counsel in connection with this Notice. Please direct all communications regarding this Notice to my attention at Brodsky & Smith, 9595 Wilshire Blvd., Ste. 900, Beverly Hills, CA 90212, (877) 534-2590, esmith@brodskysmith.com.

Sincerely,



Evan J. Smith

Attachments

Certificate of Merit

Certificate of Service

The Safe Drinking Water and Toxic Enforcement Action of 1986 (Proposition 65): A Summary

EXHIBIT “B”

LAW OFFICES
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MINEOLA, NY 11501
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PENNSYLVANIA OFFICE
TWO BALA PLAZA, STE. 805
BALA CYNWYD, PA 19004
610.667.6200

May 17, 2023

President/CEO Fruit of The Earth, Inc. c/o The Corporation Trust Company Corporation Trust Center 1209 Orange Street Wilmington, DE 19801	President/CEO Fruit of The Earth, Inc. c/o Thomas E. McCurry Sr. 3325 W. Trinity Blvd. Grand Prairie, TX 75050
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I. DESCRIPTION OF THE VIOLATION

- 1. Enforcer:** Precila Balabbo, 285 W. 6th Street, Unit 209, San Pedro, CA 90731; (Ph) 818-434-4023.
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3. **Time Period of Exposure:** Violations have been occurring since at least May 17, 2023 and are continuing to this day.
4. **Listed Chemical:** Diethanolamine (DEA) is listed under Proposition 65 as a chemical known to the State to cause cancer.
5. **Product:**

Product ²	Non- Exclusive Examples of the Product
Aloe Vera Gel	Up + Up Aloe Vera Gel UPC# 0 71661 82613 1

6. **Description of Exposure:** The exposures that are the subject of this Notice result from the purchase, acquisition, handling and recommended use of the Product. The primary route of exposure to the Listed Chemical is through dermal exposure. Some amount of exposure through ingestion can occur by touching the Product with subsequent touching of the user's hand to mouth. No clear and reasonable warning is provided with the Products regarding the health hazards of exposure to the Listed Chemical.

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Sincerely,



Evan J. Smith

² The specifically identified example of the Product in this Notice is to assist the recipients' investigation of, among other things, the magnitude of potential exposures to the Listed Chemical from other items within the definition of Products. This example is not intended to be an exhaustive or comprehensive identification of each specific offending Product. It is Balabbo's position that the alleged Violators are obligated to conduct a good faith investigation into other Products that may have been manufactured, distributed, sold, shipped, stored (or otherwise within the alleged Violators' custody or control) during the relevant period to ensure that requisite health hazard warnings were and are provided to California citizens prior to purchase and use.

Attachments

Certificate of Merit

Certificate of Service

The Safe Drinking Water and Toxic Enforcement Action of 1986 (Proposition 65): A Summary

EXHIBIT “C”

LAW OFFICES
BRODSKY SMITH

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July 7, 2023

President/CEO Fruit of The Earth, Inc. c/o The Corporation Trust Company Corporation Trust Center 1209 Orange Street Wilmington, DE 19801	President/CEO Fruit of The Earth, Inc. c/o Thomas E. McCurry Sr. 3325 W. Trinity Blvd. Grand Prairie, TX 75050
President/CEO Five Below, Inc. 701 Market Street, Suite 300 Philadelphia, PA 19106	President/CEO FOTE Europe Ltd. United Drug House, Magna Drive, Magna Business Park Citywest Road, Dublin 24, Ireland

60-Day Notice of Violation of California Safe Drinking Water and Toxic Enforcement Act¹

To Whom It May Concern:

This Notice of Violation (the "Notice") is provided to you pursuant to and in compliance with California Health & Safety Code § 25249.7(d).

Brodsky Smith represents Precila Balabbo ("Balabbo"), a citizen of the State of California acting in the interest of the general public to promote awareness of exposures to toxic chemicals from use of consumer products sold in California and to improve human health and the environment by reducing hazardous substances.

With respect to the Product herein, Balabbo has identified a violation of California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65") codified at Cal. Health & Safety Code § 25249.5, et seq. This violation has occurred and continues to occur because the alleged Violator(s) failed to provide a clear and reasonable health hazard warning in connection with the sale or use of the Product in California. Health & Safety Code § 25249.6 provides that "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to chemicals known to the State to cause cancer or reproductive toxicity without first providing a clear and reasonable warning to such individual ..." Without proper warnings regarding the toxic effects of exposures to the Listed Chemicals resulting from use of the Product, California citizens lack the information necessary to make informed decisions on whether and/or how to eliminate (or reduce) the risk of exposure to the Listed Chemicals from the reasonably foreseeable use of the Product.

¹ The public enforcement agencies that have been served with copies of this Notice are identified in the attached distribution list accompanying the Certificate of Service.

I. DESCRIPTION OF THE VIOLATION

1. **Enforcer:** Precila Balabbo, 285 W. 6th Street, Unit 209, San Pedro, CA 90731; (Ph) 818-434-4023.
2. **Alleged Violator(s):** Fruit Of The Earth, Inc.; Five Below, Inc.; FOTE Europe Ltd.
3. **Time Period of Exposure:** Violations have been occurring since at least June 2, 2021 and are continuing to this day.
4. **Listed Chemicals:** Diethanolamine (DEA) is listed under Proposition 65 as a chemical known to the State to cause cancer. Benzene is listed under Proposition 65 as a chemical known to the State to cause cancer and reproductive toxicity.
5. **Product:**

Product ²	Non- Exclusive Examples of the Product
Fruit of The Earth sun and after sun lotion/gel	Fruit of The Earth sun and after sun lotion/gel

6. **Description of Exposure:** The exposures that are the subject of this Notice result from the purchase, acquisition, handling and recommended use of the Product. The primary route of exposure to the Listed Chemicals is through dermal exposure. Some amount of exposure through ingestion can occur by touching the Product with subsequent touching of the user's hand to mouth. No clear and reasonable warning is provided with the Products regarding the health hazards of exposure to the Listed Chemicals.

II. PROPOSITION 65 INFORMATION

For the Violators' reference, enclosed is a copy of "Proposition 65: A Summary" that has been prepared by the Office of Environmental Health Hazard Assessment ("OEHHA"). For more information concerning the provisions of Proposition 65, contact OEHHA at 916.445.6900.

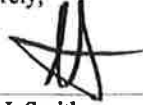
III. RESOLUTION OF THE CLAIMS

Based on the allegations set forth in this Notice, Brodsky Smith intends to file a citizen enforcement lawsuit on behalf of Balabbo against the alleged Violator(s) unless such Violator(s) agree in a binding written agreement to: (1) recall Products already sold; (2) provide Proposition 65 compliant exposure warnings for Products sold in the future or reformulate the Products to eliminate exposures to the Listed Chemicals; and (3) pay an appropriate civil penalty based on the factors enumerated in Health & Safety Code § 25249.7(b). Consistent with the public interest goals of Proposition 65 and the desire to have these violations of California law quickly rectified, Balabbo is interested in seeking a constructive resolution of the claims in this Notice without engaging in costly and protracted litigation.

² The specifically identified example of the Product in this Notice is to assist the recipients' investigation of, among other things, the magnitude of potential exposures to the Listed Chemicals from other items within the definition of Products. This example is not intended to be an exhaustive or comprehensive identification of each specific offending Product. It is Balabbo's position that the alleged Violators are obligated to conduct a good faith investigation into other Products that may have been manufactured, distributed, sold, shipped, stored (or otherwise within the alleged Violators' custody or control) during the relevant period to ensure that requisite health hazard warnings were and are provided to California citizens prior to purchase and use.

Balabbo has retained me as legal counsel in connection with this Notice. Please direct all communications regarding this Notice to my attention at Brodsky Smith, 9595 Wilshire Blvd., Ste. 900, Beverly Hills, CA 90212, (877) 534-2590, esmith@brodskysmith.com.

Sincerely,

A handwritten signature in black ink, appearing to be 'Evan J. Smith', written over a horizontal line.

Evan J. Smith

Attachments

Certificate of Merit

Certificate of Service

The Safe Drinking Water and Toxic Enforcement Action of 1986 (Proposition 65): A Summary